U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 February 2004

CASE NO. 2001-LHC-02610

OWCP NO. 01-137055

In the Matter of

WILLIAM F. FERRIOLO
Claimant

v.

NEW HAVEN TERMINAL
Employer

and

AMERICAN INTERNATIONAL GROUP
Carrier[1]

Appearances:

David A. Kelly and Robert K. Jahn (Monstream & May), Glastonbury, Connecticut, for the Claimant

Lucas D. Strunk (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM FOR PAYMENT OF MEDICAL BILLS

I. Statement of the Case

This proceeding arises from a claim for payment of medical bills filed by William F. Ferriolo (the "Claimant") against the New Haven Terminal (the "Employer") and the Employer's

[1] The Carrier, American International Group, is also identified in the record as "AIG Claim Services, Inc."

insurance carrier, American International Group ("AIG") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "Act"). In prior related proceedings, the Claimant was found entitled to benefits under the Act based on injuries sustained during the course of his employment. The present dispute between the parties involves the Claimant's request for payment of acupuncture treatments and pain medications which he contends are necessary and appropriate care for work-related injuries which he sustained on April 30, 1996. The claim for medical care was referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing was conducted before me in New London, Connecticut on July 23, 2002, at which time the Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer and AIG. The Claimant testified at the hearing, and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-18 and Respondents' Exhibits ("RX") 1-15. Hearing Transcript ("TR") 10-12, 27. At the close of the hearing, the record was held open at the parties' request for offers of additional evidence. Within the time allowed, the following evidence was offered:

Deposition Transcript, E-Fun Tsai, M.D. (7/25/02)	RX 16
Deposition Transcript, John M. de Figueiredo, M.D. (9/6/02)	RX 17
Deposition Transcript, James 0. Donaldson, M.D. (5/22/02)	RX 18
Errata Sheet completed by Dr. de Figueiredo (11/4/02)	RX 19
Deposition Transcript, Dr. Tsai, Vol. 2 (7/25/02)	RX 20[2]
Dr. Tsai's file (beginning 7/8/97 with report of Dr. Bruce B. Haak and continuing with additional reports including office notes through 10/5/01)	RX 21
Additional office notes of Dr. Tsai dated 8/4/02 through 5/9/03	RX 22
Comments of Dr. de Figueiredo regarding unavailability of Dr. Merikangas' file (4 pages)	RX 23
Notes of Dr. Tsai, dated 11/11/01 through 5/28/02 (5 pages)	RX 24
Records of James R. Merikangas, M.D. (35 pages)	RX 25
Records of Dr. Merikangas (21 pages)	RX 26

[2] It is noted that RX 16 and RX 20 are duplicate exhibits as both contain the transcript of Dr. Tsai's desposition testimony taken on July 25, 2002.

Records of James K. Sabshin. M.D., dated 5/96 through 10/01 (21 pages)	RX 27
Records of Jeffrey A. Gudin, M.D., dated 9/9/98 through 6/2/99 including Dr. Gudin's CV(15 pages)	RX 28
Records of Michael A. Luchini, M.D., dated 3/20/96 through 10/23/01 (26 pages)	RX 29
Office Notes of Dr. de Figueiredo, dated 1/8/02 through 4/21/03 (2 pages)	RX 30
Correspondence relating to unpaid medical bills (5 pages)	RX 31[3]

No objection was raised to any of the post-hearing evidence, and exhibits RX 16 through RX 31 have been admitted. By order issued on May 14, 2003, the parties were allowed until June 30, 2003 to file briefs. Briefs were received from both parties, and the record is now closed.

Upon review of the evidence of record and the parties' arguments, I conclude that the Employer and AIG cannot be held liable for the costs of Dr. Tsai's treatments prior to July 2, 2001 because the Claimant never requested authorization for her services as required by section 7(d) of the Act. With respect to Dr. Tsai's treatments after July 2, 2001, I conclude that a finding as to liability for the cost of these treatments cannot be made on this record due to the absence of a necessary party, namely, the carrier at the time of a subsequent injury on December 29, 1998 which AIG claims aggravated or contributed to the Claimant's disability, thereby relieving it of any ongoing liability. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

The Claimant is a 54 year old man who began working for the Employer as a longshoreman in April 1967. He was drafted into military service during the Vietnam War and returned to his longshoreman job at the Employer upon his discharge from the military service. TR 44-45.

It is undisputed that the Claimant suffered a series of work-related injuries during the course of his employment as a longshoreman including a right knee injury in 1988, a lower back injury in 1990, right hip and knee injuries on May 12, 1993, neck, head and right shoulder injuries on April 30, 1996, and a left shoulder injury on December 29, 1998. These injuries have been the subject of three prior proceedings before the Office of Administrative Law Judges.

[3] RX 31 was submitted with the Respondents' Trial Brief.

The first claim to come before the Office of Administrative Law Judges was OWCP No. 01-127570 in which the Claimant sought permanent partial disability benefits based on a loss of wage-earning capacity and payment of medical bills related to the May 12, 1993 right hip and knee injury. In a decision and order issued on February 19, 1999, ALJ David W. Di Nardi found that the Claimant sustained work-related injuries to his right hip and knee on May 12, 1993, resulting in a permanent partial disability for which he was awarded compensation for loss of wage-earning capacity pursuant to sections 8(c)(21) and 8(h) of the Act at a rate equal to two-thirds of the difference between his average weekly wage of $817.24 and his post-injury wage-earning capacity of $716.89. *Ferriolo v. New Haven Terminal Corp.*, Case No. 1998-LHC-02166, Decision and Order at 17, 20-21. Judge Di Nardi additionally found that the Employer had established entitlement to Special Fund relief from its compensation liability since the Claimant had a pre-existing permanent partial disability which made the permanent partial disability resulting from the May 12, 1993 injury materially and substantially greater. Decision and Order at 27. Based on these findings, Judge Di Nardi ordered the Liberty Mutual Insurance Company ("Liberty Mutual"), which was the Employer's insurance carrier at the time of the May 12, 1993 injury, to pay the Claimant's permanent partial disability compensation for a period of 104 weeks, and the Special Fund was ordered to commence compensation payments pursuant to section 8(f) of the Act upon expiration of Liberty Mutual's payments. Decision and Order at 28.

The Claimant filed a claim arising from the April 30, 1996 neck, head and right shoulder injuries, OWCP No. 01-137055, which also came before Judge Di Nardi for hearing in June 1998 along with OWCP No. 01-127570 involving the May 12, 1993 injury. At the hearing, the Claimant, the Employer and AIG, the Employer's carrier at the time of the April 30, 1996 injury, represented to Judge Di Nardi that they had reached an "agreement for voluntary payment of compensation and voluntary acceptance of some medical bills with regards to the April 30, 1996 injury" and requested that OWCP No. 01-137055 be remanded. *Ferriolo v. New Haven Terminal Corp.*, Case No. 1998-LHC-02166, Decision and Order at 4. Based on the parties' agreement, Judge Di Nardi remanded OWCP No. 01-137055 to the District Director. *Ferriolo v. New Haven Terminal Corp.*, Case No. 1997-LHC-02123 (ALJ Order July 6, 1998). As discussed in greater detail below, the Employer and AIG contend that the Claimant agreed as part of this informal settlement to not pursue coverage for the medical care that is presently in dispute and to instead submit these bills to the Claimant's group health insurance plan.

Subsequent to the June 1998 hearing before Judge Di Nardi, the Claimant sustained the last in the series of work-related injuries on December 29, 1998. He continued to work for the Employer as a signalman, the position in which he was working at the time of the June 1998 hearing, after this injury, but he stopped work due to increasing pain in November 1999 and underwent left shoulder surgery in December 1999. He then brought a third claim, OWCP No. 01-146061, for total disability benefits against the Employer and Signal Mutual Indemnity ("Signal"), which was the Employer's carrier at the time of the December 29, 1998 injury. In turn, the Employer applied for liability relief from the Special Fund pursuant to section 8(f) of the Act, asserting that the Claimant's total disability was not solely the product of the December 29, 1998 shoulder injury. This claim was heard before me on May 29, 2001, at which time the Claimant, the Employer and Signal stipulated that the Claimant had suffered a permanent disability as a result of the December 29, 1998 injury. The Employer and Signal also conceded that the Claimant was unable to return to his usual job as a signalman, and they offered no

evidence of suitable alternative employment. Based on the parties' stipulations, I found that the Claimant was entitled to an award of permanent total disability compensation commencing on September 18, 2000 as well as medical benefits reasonably and necessarily incurred as a result of the December 29, 1998 left shoulder injury. *Ferriolo v. Logistec of Connecticut, Inc*., Case No. 2000-LHC-02963 (Nov. 29, 2001), RX 13 at 5-6. I also found that the Employer was entitled to Special Fund relief as the evidence established that the Claimant had pre-existing permanent partial disabilities which were manifest to the Employer and that his permanent total disability was not solely attributable to the most recent December 29, 1998 injury. Accordingly, I limited the Employer's permanent disability compensation liability to the statutory period of 104 weeks and ordered the Special Fund to assume responsibility for payment of the Claimant's continuing permanent total disability compensation. *Id.* at 7-9.

As indicated above, the present dispute between the parties arises from the Claimant's attempt to get bills for acupuncture treatments and pain medications prescribed by E-Fun Tsai, M.D., an anesthesiologist and acupuncturist, paid by the AIG. The Claimant testified that he began treating with Dr. Tsai in October 1997 after other physicians had been unable to alleviate severe headaches and neck, shoulder and arm pain which he attributed to the April 30, 1996 accident at work. TR 56-58. Dr. Tsai's treatment consists of acupuncture and prescription pain killers. RX 3 at 39-40, 45. Prior to seeing Dr. Tsai, the Claimant had received treatment for the April 30, 1996 injuries from Michael Luchini, M.D. who referred him to James Sabshin, M.D. who performed cervical fusion surgery. TR 50-51. The Claimant testified that the surgery improved his right arm pain, but his neck and shoulder pain remained, and his headaches worsened. TR 52. On a referral from Dr. Sabshin, the Claimant began treatment with James R. Merikangas, M.D., a neurologist and psychiatrist. TR 52-53. Dr. Merikangas, in turn, referred the Claimant to a pain management specialist, and the Claimant began receiving pain treatments from Jeffrey Gudin, M.D. after the state workers' compensation agency refused approve the first specialist recommended by Dr. Merikangas. TR 53. The Claimant was asked whether the Dr. Gudin's treatment was authorized, and he responded that he was not sure "because every time I put in a request to AIG, I've never gotten no answer, never got nothing. The lady's always pregnant, always on a hospital leave, and nobody would talk to me because I hired an attorney." TR 54-55. The Claimant testified that Dr. Gudin eventually closed his practice, so he transferred his care to Dr. Tsai whom he was already seeing. TR 56.

Initially, the Claimant obtained coverage for Dr. Tsai's treatments through his group health insurance carrier which required him to make a $20.00 co-payment for each visit. TR 62-63. However, the group carrier later refused to continue coverage for Dr. Tsai's care, and the Claimant has been paying for his treatment out of pocket. TR 62. He has continued group health insurance coverage through COBRA which pays for the pain medication prescribed by Dr. Tsai subject to a co-payment. TR 63-65.

B. Liability for Dr. Tsai's Disputed Medical Services

The Claimant seeks reimbursement for payments that he has made for Dr. Tsai's acupuncture treatments as well as authorization for continuing treatment by Dr. Tsai. Claimant's

Closing Argument at 15.[4] In response, the Employer and AIG assert the following defenses: (1) the Claimant's December 29, 1998 injury aggravated the April 30, 1996 injury and thereby shifted any liability for medical care from AIG to the carrier on the risk as of the date of the later injury;[5] (2) Dr. Tsai was not the Claimant's authorized treating physician, and no application was made by the Claimant to change treating physicians; (3) Dr. Tsai's treatments are not reasonable or necessary; and (4) Dr. Tsai's care is clearly palliative and, therefore, should not be authorized as necessary medical treatment under section 7 of the Act. Respondents' Trial Brief at 6-7.

1. Authorization of Dr. Tsai

Under section 7(d) of the Act, an employee is entitled to reimbursement of medical expenses if the employee requests the employer's authorization for treatment, the employer refuses, and the treatment thereafter procured by the employee is reasonable and necessary for a work-related injury. *See Ezell v. Direct Labor, Inc*., 33 BRBS 19, 27-28 (1999) (section 7(d) of the Act requires an employee to request his or her employer's authorization for medical services performed by any physician); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112, 113 (1996) (affirming ALJ finding that employer's unreasonable delay in authorizing requested treatment amounted to constructive refusal to authorize). The Claimant has offered no evidence that he ever requested that the Employer or AIG authorize treatment by Dr. Tsai.[6] Indeed, Dr. Tsai's records reflect that she began treating the Claimant for myofacial pain of the neck and trapezius, radicular pain syndrome and cervical post-laminectomy syndrome on October 10, 1997 on a self-referral based on the recommendation of a friend. RX 3, Deposition Exhibit 3 at 1. The records also reflect that Dr. Tsai's bills were initially submitted to and paid by the Claimant's group health carrier, Diversified Administration ("Diversified"), until August 2000 when Diversified conducted a review and determined that Dr. Tsai's services were not covered. *Id. See also* RX 3, Deposition Exhibit 1. Thereafter, the Claimant submitted the bills to AIG, spawning the instant litigation. RX 31 at 5. The Claimant attempts to minimize his failure to request authorization, arguing instead that he was referred to Dr. Tsai by Dr. Merikangas. Claimant's Closing Argument at 15-16. When an injured worker is referred to a specialist by an authorized treating physician, the worker is not required to seek prior authorization for the specialist's treatment, and the employer's consent to the change in physician is not necessary. *See Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992). However, while the record in this case shows that Dr. Merikangas did refer the Claimant to Dr. Tsai for pain management, he

[4] At the hearing, the Claimant presented evidence of unpaid bills from several providers; TR 14-22; and the parties agreed that AIG would review these bills after the hearing to determine which, if any were contested in addition to the treatment and medication prescribed by Dr. Tsai. TR 110-111. In his closing brief, which was filed on July 14, 2003, almost one year after the hearing, the Claimant has only pursued the issue of coverage for Dr. Tsai's treatment.

[5] Signal was the carrier at the time of the December 29, 1998 injury. *See Ferriolo v. Logistec of Connecticut, Inc*., Case No. 2000-LHC-02963 (Nov. 29, 2001); RX 13.

[6] AIG acknowledges that it authorized treatment by Dr. Sabshin, a neurosurgeon, and Dr. Merikangas, M.D. who is board-certified in neurology and psychiatry. Respondent's Trial Brief at 2-3.

did not do so until July 2, 2001 when he wrote that he was referring the Claimant to Dr. Tsai for pain management because another physician, Dr. Levin, reportedly was not covered by the Claimant's insurance. RX 25 at 4. As discussed above, Dr. Merikangas previously referred the Claimant to Dr. Gudin, an anesthesiologist, for nerve injections to control his headaches; RX 15 at 13; and it appears that he made the referral to Dr. Tsai only after Dr. Gudin closed his practice.[7]

In the absence of any evidence that the Claimant ever requested authorization for Dr. Tsai's treatment, I find that the Employer and AIG cannot be held liable for the cost of her treatment at least prior to July 2, 2001 when Dr. Merikangas referred the Claimant to her for pain management. *See Ranks v. Bath Iron Works Corp*., 22 BRBS 310, 307-308 (1989). I will turn now to the question of liability for Dr. Tsai's services after July 2, 2001.

2. Liability for Dr. Tsai's Treatment after July 2, 2001

AIG seeks to avoid continuing liability for any medical care based on its argument that the Claimant's subsequent injury of December 29, 1998, at which time it was no longer the carrier on the risk for the Employer, aggravated the Claimant's disability and thereby shifted liability for necessary medical care to the carrier on the risk as of December 29, 1998. On this issue, the Employer and AIG correctly point out that the identification of the responsible carrier in a case where a claimant has suffered multiple traumatic injuries turns on whether the claimant's condition is the result of a natural progression of the earlier injury or a subsequent aggravation of the prior injury. That is, "if the claimant's disability results from the natural progression of the initial injury, then the carrier at the time of that injury is responsible for compensating the claimant for the entire disability . . . [but if] there is a second injury which aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto." *Price v. Stevedoring Services of America*, 36 BRBS 56, 59 (2002), citing *Foundation Contractors, Inc. v. Director, OWCP,* 950 F.2d 621 (9th Cir. 1991). The potential liability of Signal and the problems associated with their not being a party to the medical benefits proceeding was raised at the hearing, but the Claimant's attorney represented that joining Signal was not necessary as there was no factual support for AIG's claim that the December 29, 1998 injury aggravated his condition sufficiently to shift liability to Signal. TR 38-40. Upon review of the record, I disagree.

Dr. Merikangas, the Claimant's treating neurologist, testified at his deposition that he first saw the Claimant on November 5, 1997 on referral from Dr. Sabshin for treatment of headaches and pain following his neck fusion surgery. RX 15 at 8-9. He stated that the Claimant was experiencing severe headaches at that time in addition to right arm and shoulder pain, and that his treatment focused on the headaches which he described as severe and disabling. *Id.* at 10-12. Dr. Merikangas testified that he eventually referred the Claimant to Dr. Gudin, an anesthesiologist, for nerve injections in an effort to relieve the headaches, and he stated that while these injections did ultimately help, they were performed "belatedly and not

[7] Dr. Merikangas's deposition was taken on February 13, 2001, prior to the date of his referral to Dr. Tsai, so he was not questioned about the referral. RX 15.

often enough" because of "problems getting reimbursement for the doctors and getting the referrals authorized." *Id.* at 13. At the time of his deposition in February 2001, Dr. Merikangas testified that he was continuing to treat the Claimant for his headaches and pain which he described as disabling and permanent. *Id.* at 16, 21, 23. Regarding the headaches, he stated that they had "greatly improved" but his neck and shoulder problems had gotten worse. *Id.* at 31. Dr. Merikangas further testified that the December 29, 1998 left shoulder injury was "certainly a significant exacerbation of his preexisting problems", and he summarized his opinions regarding the causes of the Claimant's headaches and neck and shoulder pain as follows:

> He has an ongoing problem with his head from his headaches. There was an exacerbation of his neck in '98, according to the history and to the notes and to the documentation provided by the scan of '97 so we show a clear change in his neck. So the neck was made worse although it had a preexisting problem. And the shoulder was made worse and the headaches for which I have treated him all along are slightly better but still disabling.

Id. at 37-38. Dr. Tsai initially testified that the December 29, 1998 shoulder injury and the Claimant's subsequent need for shoulder surgery made him realize that he could no longer work as a longshoreman, but it did not worsen his neck and head pain which remained about the same. *Id.* at 46-47. However, on cross-examination by the attorney for the Employer and AIG, Dr. Tsai attributed the Claimant's headaches to post-surgical changes in his neck, and she said that she agreed with Dr. Merikangas's assessment that the December 29, 1998 injury significantly exacerbated the condition of the Claimant's neck. RX 16 at 59-60. In addition, Dr. Tsai stated in a May 9, 2001 letter to Diversified that the Claimant's neck fusion on December 1997 as a result of the April 30, 1996 injury and his left shoulder surgery in December 1999 as a result of the December 29, 1998 injury both "failed, leaving patient with severe pain in his neck, shoulders, trapezius muscle, and arms and with debilitating headaches." RX 3, Deposition Exhibit 1 at 4.

Contrary to the Claimant's assertions, I find that these opinions from the Claimant's treating physicians constitute substantial evidence that is supportive of a finding that the December 29, 1998 injury aggravated or combined with the April 30, 1996 injury to produce the Claimant's current disability, especially when this evidence is considered in light of the fact that the Claimant was able to return to work after the April 30, 1996 injury and only became permanently and totally disabled after the December 29, 1998 injury. Of course, basic due process precludes me from making a finding on this issue since Signal has not been joined and given an opportunity to offer evidence and argument. Consideration was given to remanding the case or reopening the record for joinder of Signal, but it is not at all clear whether the Claimant desires to pursue a claim against Signal for payment of Dr. Tsai's bills given his stipulation with Signal in Case No. 2001-LHC-02968, OWCP No. 01-146061 which was silent with respect to responsibility for Dr. Tsai's treatment. Consequently, I will not reach the question of liability for Dr. Tsai's bills for treatment rendered after Dr. Merikangas's July 2, 2001 referral. Should the Claimant wish to pursue this issue, he can request that the District Director transfer his claim back to the Office of Administrative Law Judges with all necessary parties, including Signal, properly named and notified.

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the claim filed by William F. Ferriolo for payment of costs associated with treatment provided by E-Fun Tsai, M.D. by New Haven Terminal and American International Group is DENIED.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachsetts